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No. 94-1669

In the Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT BRACE AND ROBERT BRACE FARMS, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners violated the Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*, by failing to obtain a Section 404 permit before discharging dredged and fill materials to convert a 30-acre wetland area into cropland.

2. If we assume that Section 404(f)(1) of the Clean Water Act exempts petitioners' discharges as "normal farming" activities, 33 U.S.C. 1344(f)(1), whether Section 404(f)(2) excepts those discharges from the exemption because the discharges converted the wetland to "a use to which it was not previously subject." 33 U.S.C. 1344(f)(2).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19a-41a) is reported at 41 F.3d 117. The opinion of the district court (Pet. App. 1a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 1994. A petition for rehearing was denied on January 9, 1995. Pet. App. 42a. The petition for a writ of certiorari was filed on April 10, 1995 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States sued petitioners for injunctive relief and civil penalties under the Clean Water Act of 1977 (CWA), 33 U.S.C. 1251 *et seq.*, based on their unpermitted discharges of dredged and fill material into a wetland area. The United States District Court for the Western District of Pennsylvania conducted a bench trial and entered judgment for petitioners. Pet. App. 1a-8a. The court of appeals reversed that judgment and remanded the case for determination of an appropriate remedy. *Id.* at 19a-41a.

1. The Clean Water Act generally prohibits the discharge of any pollutant into navigable waters of the United States unless the discharge is authorized by a permit. See CWA § 301(a), 33 U.S.C. 1311(a). The Act broadly defines the "discharge" of "pollutants" to include the addition of dredged or fill material. CWA § 502(6), (12) and (16), 33 U.S.C. 1362(6), (12) and (16). The Act defines "navigable waters" to mean "the waters of the United States." CWA § 502(7), 33 U.S.C. 1362(7).

Section 404 of the Act authorizes the Secretary of the Army to issue permits for discharges of dredged or fill material, 33 U.S.C. 1344(a) and (d). The Army Corps of Engineers and the Environmental Protection Agency (EPA) have issued regulations for administration of the permit program. Those regulations define the term "waters of the United States" to include "wetlands." 33 C.F.R. 328.3(b); 40 C.F.R. 230.3(t). See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133-134 (1985) (upholding Corps' regulatory authority over adjacent wetlands); see also *United States* v. *Pozsgai*, 999 F.2d 719, 722 (3d Cir. 1993), cert. denied, 114 S. Ct. 1052 (1994).

Section 404(f)(1) exempts certain activities from the permit program. See 33 U.S.C. 1344(f)(1). Section 404(f)(1)(A) states that a permit generally is not required for the discharge of dredged or fill material "from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices." 33 U.S.C. 1344(f)(1)(A). Section 404(f)(1)(C) similarly states that a permit is not required for discharges for the purpose of "the maintenance of drainage ditches." 33 U.S.C. 1344(f)(1)(C).

The Corps' regulations governing the administration of the Section 404 program provide guidance with respect to the statutory exceptions. The Corps' regulations state that "normal farming" activities must be part of an "established (i.e., on-going) farming" operation and "in accordance with" the regulatory definitions of the statutory terms. 33 C.F.R. 323.4(a)(1)(ii).[1] The Corps' regulations also state that "maintenance" of drainage ditches includes the "maintenance (but not construction) of drainage

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[1] Those definitions state, for example, that "[p]lowing" means "all forms of primary tillage," but "does not include the redistribution of soil * * * in a manner which changes any area of the waters of the United States to dry land." 33 C.F.R. 323.4(a)(1)(iii)(D). The definitions similarly state that "[m]inor [d]rainage" means "[t]he discharge of dredged or fill material incidental to connecting upland drainage facilities to waters of the United States, adequate to effect the removal of excess soil moisture from upland croplands," but "does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland * * *, or conversion from one wetland use to another (for example, silviculture to farming)." 33 C.F.R. 323.4(a)(1)(iii)(C).

ditches." 33 C.F.R. 323.4(a)(3). The EPA regulations contain similar provisions. See 40 C.F.R. 232.3 (c)(1)(ii)(A) & (B), 232.3(d)(3)(ii), and 232.3 (d)(4).

Even if Section 404(f)(1) exempts a discharge from the permit requirement, Section 404(f)(2) may rescind the exemption. Section 404(f)(2) provides:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. 1344(f)(2). The Corps regulation addressing that "recapture" provision states in relevant part that "[a] conversion of a Section 404 wetland to a non-wetland is a change in use of an area of waters of the United States." 33 C.F.R. 323.4 (c). For example, "a permit will be required for the conversion of a cypress swamp to some other use * * * when there is a discharge of dredged or fill material into waters of the United States in conjunction with construction of * * * structures used to effect such conversion." 33 C.F.R. 323.4(c).

2. Petitioners Robert Brace and Robert Brace Farms, Inc., own approximately 600 acres of real property in Erie County, Pennsylvania, including the 30-acre wetland site that is the subject of this suit. Pet. App. 21a. Brace's family owned and used that site as pasture for cows and horses until 1976. *Ibid.* Robert Brace purchased the property in 1975, and he periodically engaged in some brush clearing and

made some drainage improvements. The 30-acre site, however, was not used for pasturing or growing crops from 1977 to 1986. See *id.* at 21a-23a; Gov't C.A. App. A91-A95, A597, A637-A638.

In 1985, Brace began clearing all substantial vegetation from the wetland area. He discharged dredged and fill material into the wetland area by: (1) mulching, churning and levelling the wetland site (Gov't C.A. App. A97-A99, A110-A113, A644); (2) dredging material from a creek bordering the site and spreading the material over the site (*id.* at A103-A108, A644); and (3) excavating and burying several miles of plastic tubing (known as "drainage tile") at the site in an effort to drain the wetland (*id.* at A114-A115, A118, A133-A136, A152-A153, A644-A646, A160, A161). As a result of those levelling, spreading, and tiling activities, Brace was able to begin growing crops at the 30-acre site in 1986 and 1987 (*id.* at A96, A637-A638, A646). See Pet. App. 23a.

The United States Fish and Wildlife Service (FWS) learned of Brace's activities in May 1987 and referred the matter to the Corps and the EPA for enforcement. See Gov't C.A. App. A179, A293-A296, A373-A376. During the next year, the Corps and EPA issued three orders finding that Brace had violated the Clean Water Act by discharging fill material without authorization and ordering Brace both to cease and desist immediately all filling activities at the wetland site and to submit a restoration plan for the site (*id.* at A163, A165, A167). The Pennsylvania Department of Environmental Resources also issued Brace a "Notice of Violation" advising him of the need for a permit to work in wetlands and requesting a plan for restoring the site (*id.* at

A180). Brace did not comply with those orders and continued to prevent regrowth of indigenous plants by mowing the site on a regular basis (*id.* at A147, A624). See Pet. App. 23a-24a.

3. The United States filed a civil suit in October 1990. The complaint alleged that petitioners' activities at the 30-acre wetland site between October 1984 and May 1987 had violated the Clean Water Act's permit requirements. The United States sought restoration of the site, a permanent injunction, and a civil penalty. Shortly before trial, petitioners stipulated that, at the time of the discharge activities in issue, "the approximately thirty-acre site that is the subject of this lawsuit was wetlands as defined at 33 C.F.R. § 328.3(b), and 40 C.F.R. § 232.2(r)." Gov't C.A. App. A40; see Pet. App. 20a, 27a.

The United States established, either by stipulation or at trial, the five elements of a prima facie case for violations of Section 404 of the Clean Water Act: (1) petitioners admitted that they are "persons" within the meaning of the Act; (2) petitioners admitted that the activities at the site were conducted without a permit; (3) petitioners stipulated that the site was a wetland area at the time of the discharges; (4) the district court held that "the site constituted waters of the United States at the time of [petitioners'] activities" (Pet. App. 13a ¶ 7); and (5) the United States demonstrated at trial petitioners' three distinct discharge activities described above. Pet. App. 20a.

The district court nonetheless held that Section 404(f)(1) exempted petitioners' discharges from the permit requirement. The court concluded that petitioners' activities on the wetland constituted "normal farming activities," and "upland soil and water

conservation practices," within the meaning of Section 404(f)(1)(A). Pet. App. 16a. In addition, the court found that Brace's conduct was exempt as "maintenance of the drainage system" under Section 404(f)(1)(C). Pet. App. 17a. The court also concluded that Section 404(f)(2)'s recapture provision was inapplicable because "[t]he land is not being converted to a use to which it was not previously subject, nor has significant impairment to the reach or flow of waters been proven." Pet. App. 16a.

4. The court of appeals reversed, ruling that Brace's discharge activities did not qualify for an exemption from the Clean Water Act's permit requirements. Pet. App. 19a-41a. The court of appeals recognized that Section 404(f)(1) provides an exemption for "normal farming" activities, but the court ruled that the district judge had erred by relying on what was "normal" for farmers in Erie County without reference to "the regulatory construction accorded the statutory term 'normal farming activities' by the agencies charged with the implementation of the statute." Pet. App. 30a.

The court of appeals concluded that Brace's discharge activities were not "part of an 'established (i.e., on-going) farming operation'" and were not "conducted 'in accordance with the [Corps-prescribed] definitions.'" Pet. App. 31a, quoting 33 C.F.R. 323.4(a)(1)(ii). The court explained that, "[u]nder the regulations, a farming operation is *not* 'ongoing' where 'modifications to the hydrological regime are necessary to resume operations.'" Pet. App. 33a. In this case, Brace's own testimony established that the 30-acre wetland site was not used for farming from 1977 to 1986 and that he was able to begin

growing crops at the site only as a result of his levelling, spreading, and tiling activities, which stripped the site of all indigenous plants and drained the wetland. *Id.* at 32a-33a. Moreover, petitioners' admitted activities did not constitute "plowing" and "minor drainage" under the Corps' specific definitions of those terms. *Id.* at 36a-37a.

The court of appeals also held that petitioners had failed to meet their additional burden of proving that their discharge activities did not fall within Section 404(f)(2)'s "recapture" provision. The court explained that the district judge had erred in suggesting that the burden of proving "recapture" was on the United States, Pet. App. 39a, and the court concluded that "Brace's activities fall squarely within the statutory definition of 'recapture,'" *id.* at 40a. The court of appeals remanded the case for determination of the appropriate remedy. *Id.* at 41a.

ARGUMENT

Petitioners assert that the court of appeals erred in reversing the district court's determination that their conversion of a 30-acre wetland site to cropland, through undisputed levelling, spreading, and drainage activities, was exempt from the permit requirement in Section 404 of the Clean Water Act, 33 U.S.C. 1344. Contrary to petitioners' protestations, the court of appeals' decision is correct. It does not conflict with any decision of this Court or another court of appeals, and it raises no issue warranting this Court's review.

1. Petitioners contend (Pet. 9-17) that they were exempt from the Clean Water Act's permit requirement because they were engaged in "normal farming" activities within the meaning of Section 404(f)

(1). The court of appeals correctly concluded that petitioners' undisputed dredge and fill activities at a conceded wetland site did not qualify as "normal farming" activities. Under the Corps' regulations, a Section 404(f)(1) exemption is *not* available if the activities "bring an area into farming * * * use" or if "modifications to the hydrological regime are necessary to resume [farming] operations." 33 C.F.R. 323.4(a)(1)(ii). Furthermore, qualifying activities must be "in accordance with [the] definitions in § 323.4(a)(1)(iii)." 33 C.F.R. 323.4(a)(1)(ii). Petitioners' levelling, spreading, and drainage activities at the site did not meet any—much less all—of the regulatory conditions for a Section 404(f)(1) exemption.

First, petitioners were disqualified from the Section 404(f)(1) exemption because they engaged in "[a]ctivities which bring an area into farming * * * use." 33 C.F.R. 323.4(a)(1)(ii). The record shows that the Brace family used portions of its farm for growing crops, but the 30-acre wetland site at issue here was not suitable for that purpose precisely because of its wetland characteristics. Brace admitted below that no crops had been grown on the 30-acre site until the fall of 1986—after Brace had stripped the wetland of its vegetation, spread dredged material, and drained the site. See Pet. App. 32a-33a; Gov't C.A. App. A96, A647-A638, A646. The 30-acre site was used for pasturing prior to 1977, but the only activities that Brace conducted at the site between 1977 and 1986 were levelling, spreading, and drainage tiling. By Brace's own admission, he undertook those activities to convert a wetland that was *not* suitable for row cropping into a site on which crops could be grown. Pet. App. 33a.

Second, even if petitioners could reasonably contend that the 30-acre wetland parcel was already in "farming" use at the time of Brace's activities (Pet. 12), petitioners would still not qualify for the Section 404(f)(1) exemption. Although petitioners had at one time used the site for pasturing, they had ceased using the site for that purpose by 1977. They then made "modifications to the hydrological regime" of the site that were "necessary to resume [farming] operations." 33 C.F.R. 323.4(a)(1)(ii). Brace admitted at trial that drainage tubing was installed to drain the site "[s]o we could raise crops on it, productive crops." Gov't C.A. App. A646; see also Pet. App. 6a-7a, 39a; Gov't C.A. App. A114-A115, A118, A133-A136, A152-A153, A644-A646. Petitioners' activities of modifying the wetland's hydrological regime to allow row cropping disqualified petitioners from the Section 404(f)(1) exemption.

Third, petitioners failed to show that their activities were "in accordance with [the] definitions in § 323.4(a)(1)(iii)." 33 C.F.R. 323.4(a)(1)(ii). To the contrary, the Corps regulations specifically identify the activities at issue here as *not* qualifying for a Section 404(f)(1) exemption. The regulations exclude petitioners' installation of drainage tubing from the definition of "minor drainage" because it entailed (1) "the construction of any * * * structure which drains or otherwise significantly modifies a * * * wetland or aquatic area constituting waters of the United States"; and (2) "drainage associated with the immediate or gradual conversion of a wetland to a non-wetland * * *, or conversion from one wetland use to another (for example, silviculture to farming)." 33 C.F.R. 323.4(a)(1)(iii)(C)(2). Similarly, the regulations exclude petitioners' devegeta-

tion, spreading, and levelling activities from the definition of "plowing" because they consisted of (1) "the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land"; and (2) "the redistribution of surface materials by blading, grading, or other means to fill in wetland areas." 33 C.F.R. 323.4(a)(1)(iii)(D).[2]

2. As petitioners apparently recognize, even if they could establish that they qualified for a Section 404(f)(1) exemption from the Clean Water Act's permit requirements, they would additionally have to demonstrate that Section 404(f)(2)'s "recapture" provision does not override that exemption and reimpose the permitting requirements on their activities. See Pet. App. 38a. Petitioners argue (Pet. 17-22) that their activities are not subject to "recapture" because the Corps' regulation implementing Section 404(f)(2)—33 C.F.R. 323.4—provides an overbroad and improper construction of the statutory terms. That challenge, however, is not properly before this Court for review.

Petitioners did not challenge the validity of the Corps' regulation in the courts below, and neither

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[2] Petitioners assert that their activities fall within the regulatory definition of "normal farming" activities because "the regulations do not purport to be all inclusive; they are merely examples." Pet. 14. Although the regulations provide examples of "normal farming activities," they also include descriptions of categories of activities that do not fall within the exemption. The court of appeals correctly held that petitioners' activities were among those identified as *not* within the "normal farming activities" exemption. Contrary to petitioners' suggestion, the Corps' regulations do not authorize, as "normal farming activities," all activities conducted on farms.

court addressed that issue. This Court does not ordinarily consider "issues neither raised before nor considered by the Court of Appeals," *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970), and petitioners provide no reason to depart from that practice here. Indeed, it appears that the court of appeals did not place essential reliance on the Corps' regulation. The court stated that "Brace's activities fall squarely within the *statutory* definition of 'recapture.' " Pet. App. 40a (emphasis added).

The court of appeals correctly concluded that petitioners' activities satisfy the two-part statutory test for recapture. Section 404(f)(2) imposes the Clean Water Act's permit requirements on any discharges of dredged or fill material that are

> [1] incidental to any activity having as its purpose bringing an area of navigable waters into a use to which it was not previously subject,
>
> [2] where the flow of circulation of navigable waters may be impaired or the reach of such waters be reduced * * *.

33 U.S.C. 1344(f)(2). Petitioners' conceded purpose in installing several miles of drainage tubing at the site was to drain the site "[s]o we could raise crops on it" (Gov't C.A. App. A646), a use to which the 30-acre wetland site "was not previously subject." And the government produced uncontradicted expert testimony that petitioners' activities impaired the flow, circulation, and reach of "navigable waters," which the Clean Water Act defines as "waters of the United States," CWA § 502(7), 33 U.S.C. 1362(7), and which include the wetlands involved in this case, Pet. App. 13a. See Gov't C.A. App. A499-A504, A556-A557. Hence, the court of appeals was correct

in concluding that petitioners' activities were "recaptured." Pet. App. 39a-40a. That largely factual issue does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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